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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1375

REPUBLICAN NATIONAL COMMITTEE, et al.,
Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit *En Banc*

MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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Appellee Federal Election Commission moves to dismiss this appeal, or in the alternative, to affirm the decision of the court of appeals *en banc* on the grounds that the questions presented were correctly decided by the court below and are so unsubstantial as not to need further argument.

OPINIONS BELOW

The opinions below, joint findings of fact of the three-judge court and the single judge and the opinion of the three-judge court, are set forth in appellants' appendix to the jurisdictional statement in No. 79-1373. The response of the court of appeals to certified questions is also set forth in appellants' appendix to the jurisdictional statement in No. 79-1373. The court of appeals *en banc* rendered its decision for the reasons set forth in the three-judge court opinion and did not issue a separate opinion. These opinions are not yet reported. The opinion of the district court convening the three-judge court is reported at 461 F.Supp. 570.

JURISDICTION

2 U.S.C. § 437h is the extraordinary judicial review provision which provides that questions as to the constitutionality of the Federal Election Campaign Act of 1971, as amended, be certified to, and heard by, the appropriate court of appeals, sitting *en banc*. It further provides that appeal to the Supreme Court from decisions of the court of appeals *en banc* responding to certified questions shall be brought within 20 days. Pursuant to 2 U.S.C. § 437h appellants seek to have the Court expedite its consideration of the case. Section 437h does not require the Court to hear further argument on a case where the questions were improperly certified and where the questions presented are so unsubstantial as not to need further argument. Therefore, for the reasons set forth in the Argument in No. 79-1373, the Commission opposes appellants' motion to expedite.

STATUTES INVOLVED

This appeal challenges provisions of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.*, and also involves certain provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431, *et seq.* The full text of both statutes is set forth in appellants' appendix to the jurisdictional statement in No. 79-1373.

QUESTIONS PRESENTED

Whether district courts are required to certify constitutional questions to the court of appeals *en banc* pursuant to 2 U.S.C. § 437h where the essential challenge in a case is to provisions of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.*

Whether an appeal is timely under 2 U.S.C. § 437h when the jurisdictional statement is filed more than twenty days after entry of final judgment by the court of appeals *en banc.*

Whether this Court should affirm the unanimous decision of the court of appeals *en banc,* rendered after full consideration of the issues, that FECA, 2 U.S.C. § 441a(b)(1)(B), does not violate the First, Fifth, or Ninth Amendments to the Constitution.

Whether this Court should hear further argument where the questions presented by appellants were decided by this Court in *Buckley* v. *Valeo,* 424 U.S. 1 (1976).

STATEMENT OF THE CASE

This case and Nos. 79-1373 and 79-1374 arose from a single complaint which was dismissed by three unani-

mous courts. In order to avoid unnecessary duplication of argument, the complete statement of the case and the reasons why the decisions of the courts below should be affirmed are set forth fully in the Commission's motion to affirm in No. 79-1373 only. Additional jurisdictional questions as to this case and No. 79-1374 are addressed separately in the Commission's brief in opposition to petition for writ of certiorari in No. 79-1374 and in this motion to dismiss or in the alternative to affirm.

On June 16, 1978, appellants, Republican National Committee, the Ripon Society of New York and two individuals, filed a complaint in the district court seeking declaratory and injunctive relief against certain provisions of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.*, Subtitle H, Chapter 95, Internal Revenue Code (hereafter the "Fund Act") and the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431, *et seq.* (hereafter "FECA").[1] (The Fund Act and FECA are collectively referred to hereafter as the "statutes"). Appellants challenge the constitutionality under the first, fifth and ninth amendments of the requirement that candidates, in order to be eligible to receive public funds under the Fund Act, certify to the Federal Election Commission that they will not incur qualified campaign expenses in excess of the aggregate amount of their entitlement

[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) was amended as follows: Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974); Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976); Federal Election Campaign Act Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1655 (1977); Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980).

under the Fund Act,[2] and they have not and will not accept any private contributions except insofar as necessary to make up any deficiency in the Fund. 26 U.S.C. §§ 9003, 9004; 2 U.S.C. § 441a(b)(1)(B).

Appellants argued to the district court that, in keeping with the procedures utilized in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), their complaint must be decided by three courts: a three-judge court convened pursuant to 26 U.S.C. § 9011(b), the court of appeals sitting *en banc* pursuant to 2 U.S.C. § 437h, and a single judge court under 28 U.S.C. § 1331 in the event that this Court should ultimately find that jurisdiction was not proper under either 26 U.S.C. § 9011(b) or 2 U.S.C. § 437h.

Appellants filed a motion for convening a three-judge court pursuant to 26 U.S.C. § 9011(b) on September 22, 1978, but did not immediately seek certification of constitutional questions pursuant to 2 U.S.C. § 437h. The three-judge court was convened on January 3, 1979. On February 20, 1979, the Commission filed a motion to dismiss and a motion to certify to the court of appeals *en banc* whether the case presented any constitutional questions as to FECA, which were heard by the three-judge court on May 8, 1979. The court ordered the parties to expedite development of a record "in the form of transcripts of whatever depositions are to be submitted plus any statistical proof" for submission of the constitutional issues. Appellants filed their evidentiary submission, a trial memorandum and proposed findings of fact with the three-judge court on June 8, 1979, and on June 18, 1979, appellees filed their evidentiary submissions, a brief and pro-

[2] $29,440,000.00 for each candidate in 1980.

posed findings of fact. Both parties submitted proposed constitutional questions for certification to the court of appeals *en banc*. Appellants' rebuttal submission was filed on June 22, 1979.

On October 12, 1979, the single district judge and the three-judge court issued joint findings of fact, App. at 3a-43a (hereafter "Joint Findings, App. at ——"), and the single judge certified to the court of appeals *en banc* a question as to the constitutionality of 2 U.S.C. § 441a(b)(1)(B).[3] An expedited briefing schedule was established in the court of appeals by motion of the appellants and consent of the appellees and briefing was completed on November 28, 1979. On February 6, 1980, the court of appeals *en banc* answered the certified questions in the negative, finding that 2 U.S.C. § 441a(b)(1)(B) does not violate the First, Fifth or Ninth Amendments to the United States Constitution. App. at 67a-69a. The court of appeals' decision was rendered "substantially for the reasons set forth in the opinion of the three-judge court filed in the case on February 5, 1980." App. at 69a.

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[3] Does 2 U.S.C. § 441a(b)(1)(B) violate the rights of one or more of the plaintiffs under the First, Fifth or Ninth Amendment to the Constitution—

(a) by preventing a major party presidential candidate who accepts public financing for his general election campaign from making campaign expenditures in excess of the limits set forth therein;

(b) by preventing a major party presidential candidate who accepts public financing for his general election campaign from accepting, and preventing other persons from giving, campaign contributions (including expenditures coordinated with the candidates' campaign) to that campaign;

(c) by discriminating invidiously against major party presidential candidates who are challenging incumbents;

(d) by being overbroad?

Appellants filed their notice of appeal on February 19, 1980, App. in No. 79-1375 at 6a-7a, and their jurisdictional statement on March 7, 1980. They seek establishment of an expedited briefing schedule and oral argument this term in order that this Court may render its decision before the July 1980 presidential nominating convention.

MOTION TO DISMISS APPEAL

Appellee Federal Election Commission moves to dismiss this appeal for the following reasons.

2 U.S.C. § 437h is the extraordinary provision for *en banc* determination of constitutional questions concerning FECA. It was enacted by Congress as a special mechanism to provide prompt judicial consideration of constitutional questions raised during congressional consideration of the Federal Election Campaign Act Amendments of 1974. Pub. L. No. 93-443, 88 Stat. 1263 (1974). This unique jurisdictional provision, which ultimately became 2 U.S.C. § 437h, was introduced on the floor of the Senate by Senator Buckley during consideration of S. 3044, the Federal Election Campaign Act Amendments of 1974. 119 Cong. Rec. S5707 (daily ed. April 10, 1974) (remarks of Sen. Buckley). Congressional debate indicates that Senator Buckley offered the provision specifically to provide prompt judicial review of certain new prohibitions of the 1974 amendments to FECA which he considered unconstitutional.

Appellants have sought, at every stage of the proceedings in this case, to require duplicative and overlapping judicial proceedings in order to avoid the perceived "jurisdictional ambiguities" raised because FECA and the Fund Act have distinct modes of judi-

cial review.[4] Juris. Statement at 4-6. While this procedure may have been necessary in the comprehensive challenge of *Buckley* v. *Valeo,* 424 U.S. 1 (1976), the statutory provisions challenged in this case are the requirements that a candidate agree to adhere to the expenditure limitation and that a candidate agree not to accept private funds. 26 U.S.C. § 9003.[5] Although appellants' prayer for relief makes reference to "provisions of the FECA," the only direct relief they seek is abolition of the agreement to adhere to the expenditure limitation in 26 U.S.C. § 9003. Therefore, proper jurisdiction in this case lies in 26 U.S.C. § 9011(b), *see* Commission's motion to affirm in No. 79-1373, and district courts should not be required to certify questions pursuant to 2 U.S.C. § 437h in such cases.

In the only two cases which, as of yet, have reached this Court in which district courts have certified constitutional questions pursuant to § 437h, the courts have utilized the joint sitting of two courts (three-judge district court and *en banc* court of appeals).

[4] 2 U.S.C. § 437h provides for certification of questions as to the constitutionality of FECA to the court of appeals which must hear the matter sitting *en banc*. 26 U.S.C. § 9011(b) provides that suits to implement or construe provisions of the Fund Act be heard by a three-judge court. Both provisions provide for expedited treatment and direct appeal to this Court. The full text of both statutes is set forth in appellants' appendix to the jurisdictional statement in No. 79-1373.

[5] Although the amount of the limitation is set forth in 2 U.S.C. § 441a(b)(1)(B), the requirement to adhere is part of the Fund Act, not FECA. The amount of the limitation is in 2 U.S.C. § 441a only because, in 1974 when the limitation was created, there were overall expenditure limitations (originally set forth in 18 U.S.C. § 608). Accordingly, Congress placed all such limits in Title 2. With the striking of the overall limits in Title 2, section 441a(b)(1)(B) remained, in the nature of a cross-reference to the Fund Act.

Buckley v. *Valeo,* 424 U.S. 1, 9 n.6 (1976); *Clark* v. *Valeo,* 559 F.2d 642, 645-646 (D.C. Cir. 1977), *aff'd sub nom. Clark* v. *Kimmitt,* 431 U.S. 950 (1977) (complaint dismissed for lack of ripeness). In both cases, however, plaintiffs sought to invalidate provisions of the Fund Act, Chapter 96 and FECA. Surely Congress in providing for such distinct modes of review did not intend that the burden on judicial resources of dual sittings would be invoked by the mere suggestion that the interplay of the two acts renders unconstitutional a specific provision of one. *Cf. Kesler* v. *Department of Public Safety,* 369 U.S. 153, 157 (1962) (three-judge court "a serious drain upon the federal judicial manpower").[6]

[6] Moreover, this appeal is untimely under 2 U.S.C. § 437h, which provides in pertinent part that "such appeal shall be brought no later than 20 days after the decision of the court of appeals." Appellants' jurisdictional statement was filed 30 days after the decision of the court of appeals. Unlike other similar provisions, such as the general statutory provision governing appeals to this Court and petitions for certiorari, and the rules of this Court, which refer to the time in which an appeal must be "taken," 28 U.S.C. § 2101, section 437h states that the appeal shall be "brought" to the Court within a specified period—20 days.

The legislative history of section 437h is sparse, but indicates that Congress intended to expedite cases raising the constitutionality of the Act at every possible stage of judicial proceedings. "It provides, or by providing for an appeal period of only 20 days, I think that tends to also lessen the time that would be required . . .". Committee on House Administration, 93d Cong., 2d Sess., Mark-up of Federal Election Campaign Act Amendments of 1974 (Transcript of Proceedings, June 26, 1974) (remarks of Mr. Frenzel). If the 20 days is applicable only to the notice of appeal, and the standard 90 days set forth in the Court's rules is available for the filing of the jurisdictional statement, then the total time taken by an appeal would not be further lessened by the inclusion of the 20 day time deadline.

Only two cases pursuant to 2 U.S.C. § 437h have reached this Court; it is unclear from the procedures utilized in those cases,

For the foregoing reasons, this Court should dismiss this appeal.

MOTION TO AFFIRM

In the alternative, the Commission requests that the Court affirm the decision of the court of appeals dismissing the complaint for the reasons set forth in its motion to affirm in No. 79-1373.

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and from the Court's decisions, whether § 437h would be construed to require the filing of the jurisdictional statement within 20 days. Both cases included challenges brought pursuant to 26 U.S.C. § 9011(b) which has no similar time requirement. *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (decision of court of appeals dated August 15, 1975; jurisdictional statement under 2 U.S.C. § 437h filed September 19, 1975); *Clark* v. *Valeo*, 559 F.2d 642 (D.C. Cir. 1977), *aff'd sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977) (decision of court of appeals dated January 21, 1977; jurisdictional statement under 2 U.S.C. § 437h filed February 9, 1977).

CONCLUSION

This appeal should be dismissed for the foregoing reasons, or in the alternative, the decision of the court below should be affirmed for the reasons set forth in the Commission's motion to affirm in No. 79-1373.

Respectfully submitted,

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